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CHARLES ELMORE C
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IN THE

Supreme Court of the United States

October Term, A. D. 1932.

No. [redacted] 2

JOHN FACTOR,

Petitioner,

vs.

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General,

Respondents.

REPLY BRIEF OF PETITIONER ON CERTIORARI.

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HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

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I.

Respondents attempt to avoid the absence in Illinois of any law making criminal the offense charged against petitioner by contending that there is no such requirement is untenable.

Counsel for the respondents, in effect conceding that the offense charged against petitioner is not a crime in Illinois, devotes the major part of his brief to an effort to get this Court to depart from the doctrine of *Wright* v. *Henkel,* 190 U. S. 40, uniformly followed, both by this Court and all tribunals subordinate to it. In other words the effort on the part of counsel is to have this Court declare that if the crime for which extradition is sought is a crime in the demanding country and is included within the terms of the extradition treaty, the fact that it is not a crime in the State of Illinois will not deprive a Commissioner sitting in Illinois of jurisdiction. Upon this point the Commissioner, the District Court, and the Circuit Court of Appeals have

held, following this Court, that in order to sustain extradition the offense charged must satisfy all three requirements. In our original brief the expressions of this Court on that subject are cited. (Brief of Petitioner on Certiorari, Point I, pp. 13-15.) It is believed that they are final and compelling and that nothing need be added to them here.

"Receiving property knowing the same to have been fraudulently obtained," is not a crime in Illinois unless the effect of the holding of this Court in *Kelly* v. *Griffin*, 241 U. S. 6, is to create such a crime. The Commissioner so held, having had the benefit of expert advice from eminent judges, prosecuting attorneys, and lawyers of the Illinois bar, all of them affirmatively saying that there is no such crime known to the law of that State. Judge Carpenter in the District Court so held. The Circuit Court of Appeals rested its decision upon *Kelly* v. *Griffin*, 241 U. S. 6.

In the dissenting opinion of Judge Evans and in the opinion of Judge Carpenter it is pointed out that the industry of counsel and of the Court combined has failed to find any applicable law in force in Illinois.

Incidentally it may be pointed out that in the British Empire extradition depends, as it does with us, upon the state of the local law as one of the essential elements. Extradition from Canada is controlled by the state of the Canadian local law, and in the extradition statute of Great Britain set up on page 76 of respondents' brief it is expressly provided that the British government may by Order in Council at any time restrict the operation of an existing extradition treaty by excluding portions of the British Empire from its operation.

It has never been supposed that extradition could be had from New Zealand on the basis of the local law of Great Britain. Both the British Empire and the United States are federations and the policy of both is to respect the

local law of their constituent members. There is therefore nothing either anomalous or unexpected in the declarations by this Court that the local law of the place where the accused is found is determinative of the third essential to the jurisdiction of a Commissioner in such proceedings.

The respondents' complaint that there might be divergent results from the application of varying laws in the several states has already been passed upon by this Court.

In *Wright* v. *Henkel,* 190 U. S. 40, there is quoted with approval, at page 60, the following:

> " 'As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations.' "

We regard this whole question as settled both in principle and by repeated adjudications of this Court. The attempt to reopen the question concedes that the industry of counsel, like that of the courts which have considered this case, has failed to find the offense charged in the complaint to be a crime in Illinois.

II.

The State and Federal Statutes cited by respondents.

An effort is made by respondents to find some statutory basis for extradition either in the law of Illinois or in Federal law (Respondents' Brief, Point IV, pp. 45-60). When these statutes are examined it will be found that the offense charged in the complaint is not any one of the crimes set forth in the statutes referred to; and if the complaint had charged any crime covered by any of those statutes the evidence would not sustain the accusation.

In the course of the hearing before the Commissioner counsel for the demanding government stated frankly that he had advised the British government to bring a charge which would be covered by a statute in Illinois, and that it had determined that it could not so charge the accused and that in fact the offense that it did charge was the only one it was justified in asserting. In addition to this, these statutes were cited to the Commissioner and he disposed of them, by saying:

> "There is no charge in the complaint of embezzlement or larceny or receiving money, valuable security or other property knowing the same to have been embezzled or stolen. Counsel for the demanding government has contended that there is some evidence tending to prove larceny as bailee or larceny by trick. This is not charged in the complaint, and I now say *that I am unable to discover in the record sufficient competent evidence to sustain such finding.*" (R. 19; Italics ours.)

It is therefore idle to speculate as to what might have been the effect of charges not made in the complaint, since the Commissioner found an absence of evidence to sustain any one of them had it been made. The Commissioner held that if the petitioner had been charged under any of these Illinois statutes he would have been obliged to hold

that there was no sufficient competent evidence to show probable cause upon which petitioner could be held. It is not possible, therefore, to regard the statutory offenses as the equivalent of the charge contained in the complaint and to say that evidence which was not adequate to justify holding him under the statutes themselves is nevertheless adequate to hold him under the charge made in the complaint on the theory of substantial identity.

Of course the failure to charge petitioner with any of the offenses discussed under Point IV of the demanding government's brief renders his extradition on such charges impossible in any event. (See Petitioner's Original Brief, Point II, pp. 16-20.)

The Federal Statutes cited are with one exception (Mail Fraud Statute, which has no relevancy) by their terms applicable only in territory over which the Federal government has exclusive jurisdiction. They are therefore inapplicable. Their inapplicability is not cured by the fantastic suggestion appearing on pages 58 and 59 of the demanding government's brief that the second warrant in this case was read to the petitioner while he was in the Federal Building in Chicago, to which place he had been taken for hearing after his arrest on the first warrant. The statement on page 58 that the petitioner selected the Federal Building as a place to surrender himself is not sustained as a fact by the record. But if it were, that fact would not make applicable to his case Federal Statutes dealing with liability for offenses committed on territory over which the Federal government asserts exclusive jurisdiction.

The difficulty with the effort of respondents' counsel to find a statutory basis for this proceeding is that, taking his own view of the evidence, which is at variance from that of the Commissioner, he thinks it would be possible to charge the petitioner with some crime denounced by the laws of Illinois; but when he has done so he finds none of the crimes

in question to be the one charged in the complaint, if indeed they are crimes within the purview of the treaty itself.

The essential characteristics of the crime charged in the complaint are not embraced in any of the statutes cited by the demanding government, nor by any other statute or law applicable in the State of Illinois. Extradition of petitioner upon this charge therefore may not legally be had. Neither the Commissioner, Judge FitzHenry, Judge Carpenter, nor the Circuit Court of Appeals found any statute or law making this offense criminal in Illinois. Each decision adverse to the petitioner was predicated upon the erroneous view that the case of *Kelly* v. *Griffin* compelled the inferior tribunals to hold the petitioner was subject to extradition. The inapplicability of the *Kelly case* to the case at bar is pointed out in our original brief (Point IV, pp. 29-35).

We are not seeking a strict or technical construction of the statutes cited by the demanding government nor any illiberal treatment of its complaint. Both governments recognize that an extraditable offense must be an offense under the laws of both governments and enumerated in the treaty and neither government expects the other to violate or enlarge the treaty as a mere matter of complaisance, when they have gone to the trouble to establish the treaty as the definition of the legal rights of both.

III.

Effect of Dawes-Simon Treaty of 1932.

Counsel for respondents, on page 78, *et seq.*, of their brief, suggest that the Secretary of State has expressed the opinion that the Dawes-Simon Treaty is not in force. This is contrary to the fact. The letter of the State Department of January 6, 1933 (R. 1282) states that "no occasion has arisen requiring it to pass on the question."

Counsel for respondents, on page 82 of his brief, cites Section 29, Title 1, U. S. C. A., to the effect that the repeal of any statute shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred under such statute unless the repealing clause expressly so states. It is suggested that this saving clause if applied to these proceedings makes it immaterial whether the Dawes-Simon Treaty is in fact in force, since these proceedings were begun under the Treaty of 1842 and the Convention of 1889.

Section 29, Title 1, U. S. C. A., applies by its terms to statutes. Treaties are not statutes. Moreover, it is not here sought to extinguish any penalty, forfeiture or liability incurred under any statute. In addition to this the Dawes-Simon Treaty, by Article 18, provides that on its coming into force Article 10 of the Treaty of 1842 and the Convention of 1889 "shall cease to have effect," so that if the Dawes-Simon Treaty be considered as a repealing statute its own terms extinguish all proceedings resting upon the earlier treaties by depriving them of effect for any and all purposes.

CONCLUSION.

We protest against the distorted and prejudiced "Synopsis of the Facts," printed as an appendix to respondents' brief. It is wholly unfair to the record but we refrain from a detailed discussion as it is conceded that the facts can not here be reviewed.

Great Britain and the United States have stipulated in their treaties how far they are willing to go in granting extradition. Persons accused of conduct not made criminal where they are found are not subject to extradition. The courts of both countries will protect accused persons in their rights. The grace or discretion resting in the political department of the government arises only after the courts have assured a person sought to be extradited that his rights have been accorded him. It is in the political field that concessions may be made. In the judicial field rights must be enforced and persons protected from unlawful detention. All arguments, therefore, addressed to this Court that it should be "liberal" are beside the point if the "liberality" suggested requires a refusal to protect the rights of an accused by a failure to follow the plain language of the treaty.

Respectfully submitted,

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